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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1974

No.

LEVI WHITTED,
Petitioner

v.

STATE OF NORTH CAROLINA,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

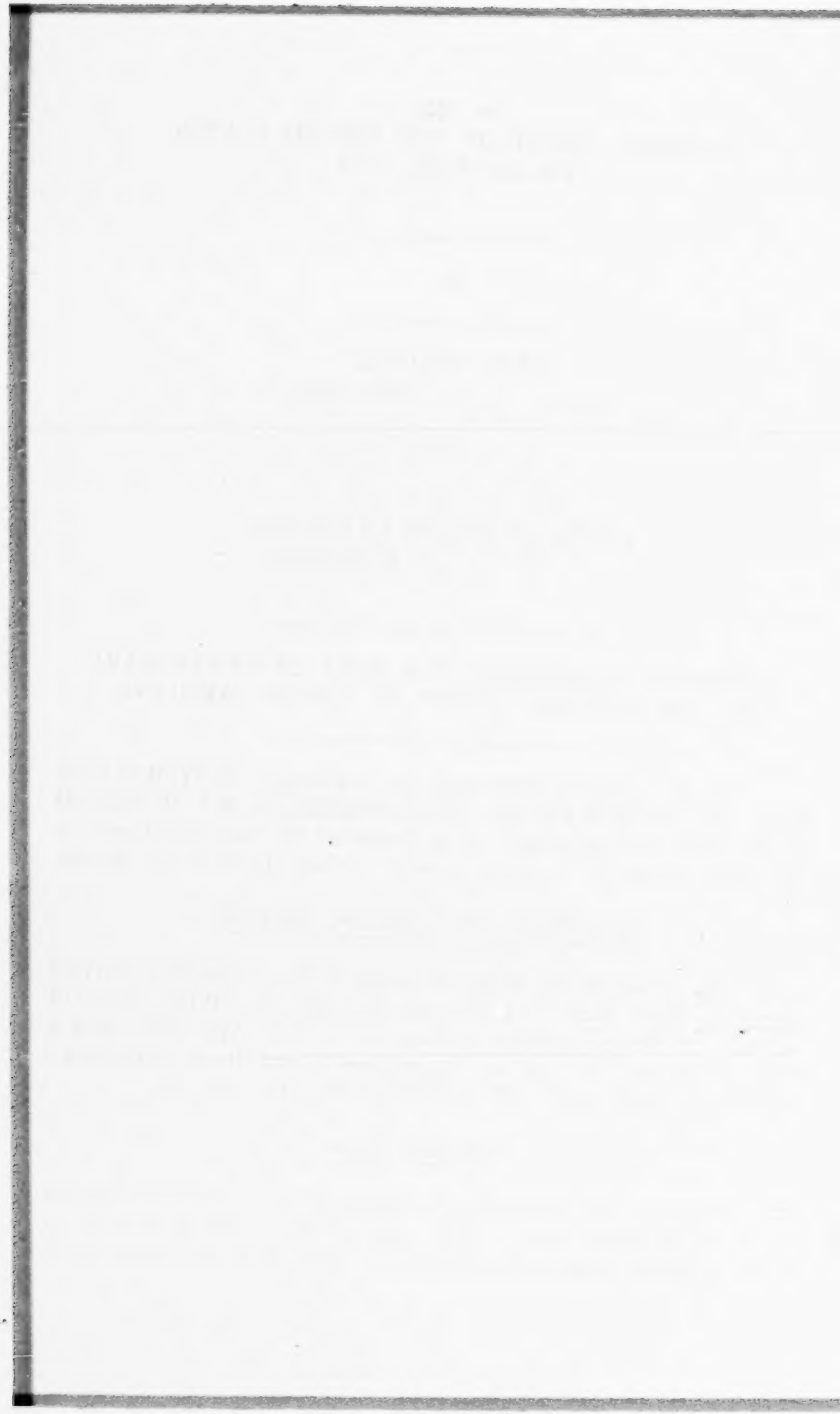
The Respondent prays that the Petitioner's PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA seeking review of an Order of the Supreme Court of the State of North Carolina entered on July 1, 1974, be denied.

CITATIONS TO OPINIONS BELOW

The Order of the Supreme Court of North Carolina denying certiorari dated July 1, 1974, and the opinion of the Court of Appeals of North Carolina reported at 21 N.C. App. 649, filed 5 June 1974, are set out in Appendices I and II of Petitioner's PETITION FOR WRIT OF CERTIORARI (pp. 20, 28).

JURISDICTION

This case was decided by the Supreme Court of North Carolina by an order dated July 1, 1974, and by the Court of Appeals of North Carolina, *State v. Levi Whitted*, 21 N.C. App. 649, June 1974.



The petitioner attempts to invoke the jurisdiction of this Court under 28 U.S.C. §1257(3) and further under the Fourth Amendment to the United States Constitution and Sections 19, 20, and 23, Article 1, Constitution of North Carolina. The Respondent contends that there has been no deprivation of rights secured by the Constitution of the United States and that this Court should not assume jurisdiction of this case.

STATEMENT

Defendant-appellant was tried on three separate bills of indictment returned in Durham County Superior Court charging defendant with felonious possession of "...Heroin which is included in Schedule I of the North Carolina Controlled Substances Act", felonious possession with intent to distribute heroin, and felonious manufacture of heroin. (R.pp. 2,3,4). Defendant was tried during the October 8, 1973, Session of Superior Court held in Durham County, the Honorable Edward B. Clark, presiding.

Upon motion of the District Attorney, the three charges against defendant were consolidated for trial. Defendant entered pleas of not guilty to the charges.(R.p.5). The jury returned a verdict of guilty to all three charges and defendant was sentenced to prison terms of five (5) years for possession of heroin, five (5) years for possession of heroin with intent to distribute and not less than four (4) nor more than five (5) years for manufacture of heroin. (R.pp. 5-7). In apt time, defendant gave notice of appeal to the North Carolina Court of Appeals.

The Court of Appeals of North Carolina reversed the convictions and arrested the judgments to the charges of possession with intent to distribute and manufacture of heroin and affirmed defendant's conviction of felonious possession of heroin. Defendant petitioned the North Carolina Supreme Court for Certiorari to review the decision of the Court of Appeals of North Carolina affirming defendant's conviction of possession of heroin and the State petitioned the North Carolina Supreme Court for Certiorari to review the decision of the Court of Appeals of North Carolina reversing and arresting judgments of the defendant's convictions of possession of heroin with intent to distribute and manufacture of heroin. The Supreme Court denied both petitions, the defendant's by order filed July 1, 1974 and the State's by order filed August 30, 1974.

STATEMENT OF FACTS

Sgt. J. C. Fuller of the Durham Police Department, Vice Squad, on March 6, 1973, secured a search warrant authorizing him to search the premises of Levi Whitted, the person of Larry Lee and Larry Lee's vehicle for the controlled substance, heroin. The search warrant was issued upon a finding of probable cause by the issuing magistrate based upon information furnished him by Sgt. Fuller. The sworn affidavit furnished the magistrate read as follows:

> "Sgt. J. C. Fuller, Vice Squad, Durham Police Department, Durham, North Carolina; being duly sworn and examined under oath, says under oath that he has probable cause to believe that Levi Whitted and Larry Lee has the premises of Levi Whitted, the person of Larry Lee and his vehicle, certain property, to wit: Heroin, the possession of which is a crime, to wit: illegal possession of heroin, 3-6-73, Rt. 2, Guess Rd., Durham, N. C. approx. 1/2 mile South of Russell Rd. The property described above is located on the premises of Levi Whitted and the person of Larry Lee and Larry Lee's vehicle described as follows: Rt. 2, Box 275, Guess Rd., Durham, N. C. home of Levi Whitted is a one story brick home with an attic. Located on East side of Guess Rd. front facing West. Larry Lee, bm, dark skin, 6 feet, 180 pounds has afro, age 25. Has 1969 Eldorado, with white over maroone, two door cadillac, N. J. license. License No. STN-471. The facts which establish probable cause for the issuance of a search warrant are as follows: A reliable citizen of the City of Durham, N. C. who has given me information in the past that has led to the arrest and conviction of several people in Durham County Superior Court, dates of conviction being week of 4-24-72, 7-17-72 and 11-20-72, all drug convictions. This informer stated to me on 3-6-73 that on this date he was in the home of Levi Whitted, Rt. 2, Guess Rd., Durham, N. C. in the presence of Larry Lee. At that time he saw within the above address a quantity of heroin in the possession of Larry Lee. This informer has been in the Vice Squad Office on several occasions and has correctly identified heroin and recognizes

heroin when he sees it.

s/ J. C. Fuller
Signature of Affiant

Sworn and subscribed to before me this 6 day of March, 1973
s/ JEWEL PARRISH
Magistrate"

The search warrant read as follows:

"STATE OF NORTH CAROLINA
COUNTY OF DURHAM

In The General Court of Justice, District Court Division

To Any Lawful Official Empowered to Conduct the Search Authorized by this Warrant - -
GREETING:

Whereas information has been furnished me by the affiant named in the affidavit on the reverse hereof, who stated that under oath that Levi Whitted and Larry Lee has property described in said affidavit, related in the manner described in the affidavit with the commission of a crime, also described in the said affidavit, that such property is located as described in the affidavit. And whereas I have examined under oath the affiant and am satisfied that there is probable cause to believe that the named person has such property on the premises of Levi Whitted, the person of Larry Lee & Larry Lee vehicle, described in the aforesaid affidavit, you are commanded to search the premises and person of Larry Lee and Larry Lee's vehicle for the property in question. If this property is found, seize it and keep it subject to court order.

Herein fail not and of this warrant make due return.

Issued this 6 day of March, 1973, at 11:45 o'clock A.M., upon information furnished under oath by the affiant, named below:

s/SGT. J. C. FULLER
Affiant

s/JEWEL PARRISH
Magistrate

Jewel Parrish
Issuing Official

SEARCH WARRANT

Issued: March 6, 1973 at 11:45 A.M.

RETURN

I hereby certify that on March 6, 1973 at 11:45 A.M., this Search Warrant came into my hands, and that on March 6, 1973 at 12:15 P.M., I made search of Rt. 2, Guess Rd, Box 275, Levi's House, as therein commanded. I took into my custody the following: Green Veg. Mat., 3 bags White Powder, Suit Case, 2 Strainers, Spoons, ... , 1 Box Glasine Bags, Measuring Spoons, 116 Pills, $810.00, which is held subject to further court orders.

This 6 day of March, 1973, at 4:30 P.M.

s/ NORMAN McCLENNY
Durham County Police

This executed search warrant was returned to me on March 6, 1973 at 5:00 P.M.

s/W. L. Hilliard
Magistrate

After the issuance of the search warrant, Sgt. Fuller, along with other law enforcement officers, went to the residence of the defendant where the warrant was served on his daughter. (R.23). Upon seaching the house, the officers found various paraphernalia used in the manufacture and distribution of heroin, including a

measuring spoon, a sifter, a single playing card and a quantity of quinine, as well as a quantity of heroin. (R.pp. 37, 42, 43, 67).

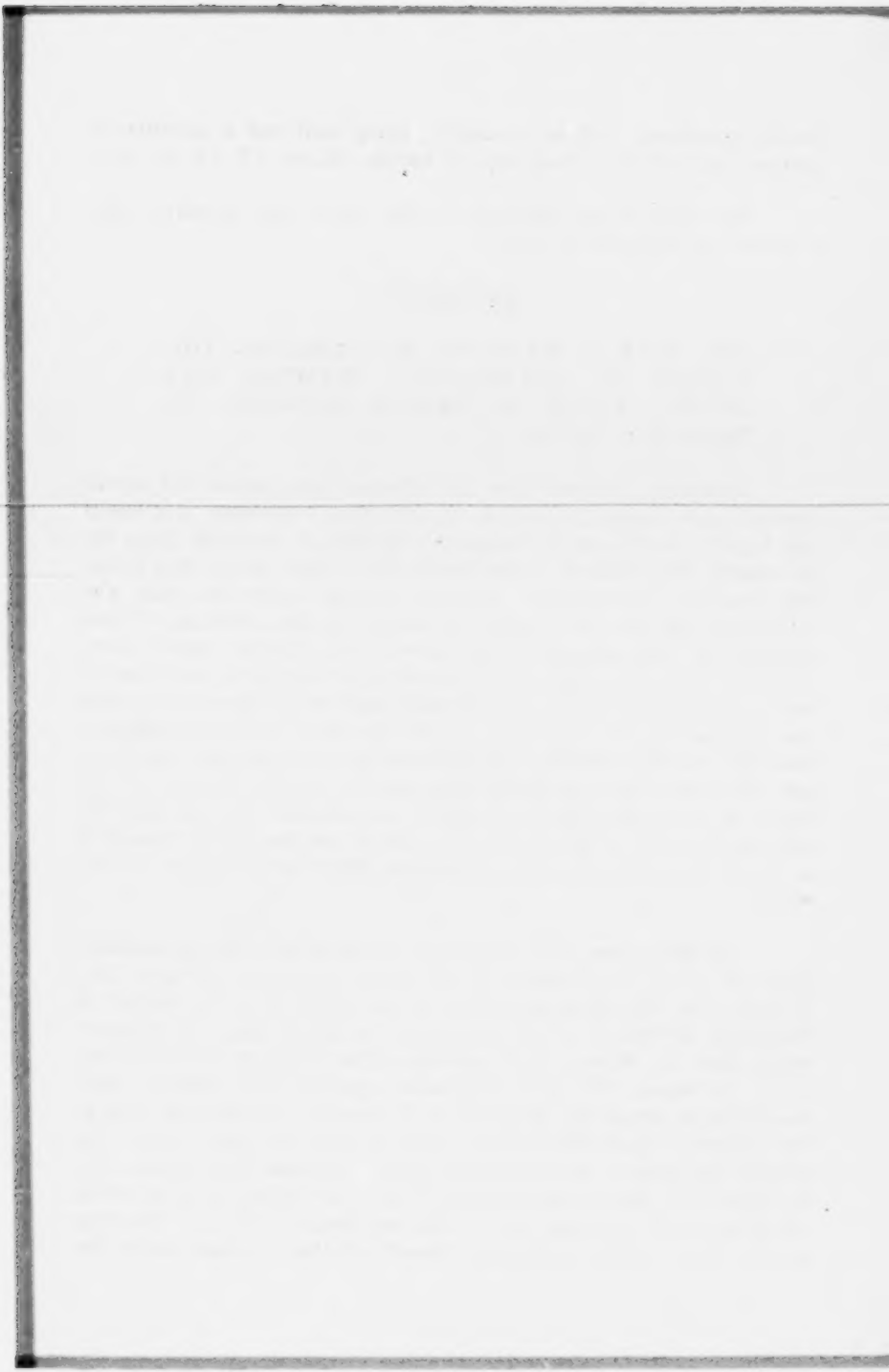
The items found pursuant to the search were admitted into evidence at defendant's trial.

ARGUMENT I

THE SEARCH WARRANT AUTHORIZING THE SEARCH OF DEFENDANT'S PREMISES WAS ISSUED AFTER A PROPER FINDING OF PROBABLE CAUSE.

Appellant contends that the affidavit upon which the search warrant authorizing the search of defendant's premises was based was legally insufficient to support a finding of probable cause for the search. The affidavit, sworn to by Sgt. Fuller, stated that Fuller had received information from a reliable informant that the informant had seen a quantity of heroin on the premises of Levi Whitted in the possession of Larry Lee. Clearly, upon being presented with this information furnished by a reliable, confidential source, a law enforcement officer could rightfully believe that heroin was located on the premises of Levi Whitted. While it perhaps is best that search warrants and affidavits upon which they are based not delve into who is doing what insofar as the location of the search is concerned, the State would submit that the fact that the informant stated to Sgt. Fuller that the heroin was in the possession of Larry Lee does not have a limiting effect on the scope of the search.

Appellant does not argue that the affidavit fails to establish probable cause for a search of the person or vehicle of Larry Lee. In order for the place described in the affidavit to be limited as Petitioner desires, it would appear to the State that the Affidavit would have to contain some wording upon which such a limitation could be leased. No such limitation appears. The affiant, after describing in detail the location of Petitioner's residence as well as the residence itself (including a reference to the attic where the heroin was found), stated he had been informed that "within the above address" heroin was located. There is no indication as to where on Petitioner's premises the heroin was located. This, in the eyes of the State, would authorize a search of the premises where the



heroin had been seen. Such a search of the premises would, of course, include the attic. *U.S. v. Meyer*, 417 F.2d. 1020 (1969).

The State does not contend that the Affidavit upon which the search warrant in this case was issued, without changing a single fact contained therein, could not have been better written. In light of this Court's decision in *United States v. Ventresca*, 380 U.S. 102, 13 L.Ed. 2d. 684, 85 S.Ct. 741 (1965), however, to the effect that an affidavit for a search warrant should be interpreted in a commonsense and realistic fashion, the State submits that the Affidavit upon which the search warrant was based contained ample evidence for a proper finding of probable cause.

II

THE SEARCH WARRANT UNDER WHOSE AUTHORITY DEFENDANTS PROPERTY WAS SEARCHED PROPERLY AUTHORIZED THE SEARCH OF DEFENDANT'S PREMISES.

The search warrant under whose authority Sgt. Fuller and other law enforcement officers searched defendant's premises was based upon an affidavit properly establishing probable cause for the issuance of the warrant. The search warrant stated that the property the subject of the search was located as described in the affidavit and commanded a search of the premises. The Affidavit most clearly describes defendant's premises as follows:

> "Rt. 2, Box 275, Guess Rd., Durham, N. C. home of Levi Whitted is a one story brick home with an attic. Located on Eastside of Guess Rd. front facing West."

Since the search warrant in this instance made direct reference to the affidavit, and since, under North Carolina law the affidavit establishing probable cause is required to be attached to the search warrant (N.C.G.S. 15-26), the State respectfully submits that there is no question but that the warrant properly commanded a search of defendant's premises.

In support of this contention, see *State v. Vestal*, 278 N.C.

561, 180 S.E. 2d 881, *State v. Foye*, 14 N.C. App. 200, 188 S.E. 2d 67.

CONCLUSION

For reasons stated, the Respondent contends that the judgment of the trial court, as affirmed by the North Carolina Court of Appeals, in no way violated the Constitution of the United States. The Respondent respectfully submits that this Court should, on that basis, deny the Petition for Writ of Certiorari to the Supre Court of North Carolina.

Respectfully submitted,

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North Carolina

H. A. COLE, JR.
Assistant Attorney General

Walter E. Ricks

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Assistant Attorney General

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North Carolina, Respondent

Department of Justice
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Telephone: (919) 829-3316

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA upon the Attorney for the Petitioner, Levi Whitted, by placing copies of said RESPONSE in the United States Post Office at Raleigh, North Carolina, with postage prepaid and with the same addressed to:

Herman L. Taylor, Esquire
Taylor and Upperman
Post Office Box 20383
Greensboro, N. C. 27420

This the 20th day of December, 1974.

Walter E. Ricks, II
Assistant Attorney General
of North Carolina